Filed 5/12/10 In re Johnson CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re JAVIER JOHNSON, on Habeas Corpus.	B217731 (Los Angeles County Super. Ct. No. TA080069)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Kelvin D. Filer, Judge. Petition denied.

Javier Johnson, in pro. per., and Victor J. Morse, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, and Alene M. Games, Deputy Attorney General, for Respondent.

Petitioner Javier Johnson was convicted in 2006 of murder in connection with a drive-by gang-related shooting. In this habeas corpus proceeding, he alleges that the trial court denied him his Sixth Amendment right to counsel under *Massiah v. United States* (1964) 377 U.S. 201 [84 S.Ct. 1199, 12 L.Ed.2d 246] (*Massiah*) by admitting a taped jailhouse conversation with a friend; his trial counsel was ineffective for failing to object to the evidence; and appellate counsel was ineffective for failing to raise these issues on appeal. We conclude defendant's Sixth Amendment right to counsel had not attached at the time the conversation was taped, that *Miranda* warnings do not apply to a nonpolice interrogation, and deny the petition.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

On November 28, 2003, at around midnight, Nicole Williamson and six of her friends were "hanging out" near her parked car in front of her house in Carson, listening to music. A sedan carrying three young men drove up and the front-seat passenger fired several shots at Nicole and her companions, killing Nicole and seriously injuring her friend Raynesha Bates. Although Nicole, Raynesha and her friends Jarae Davis and Treyvionn Jackson did not belong to a gang, they were in an area claimed by the Piru Centerview gang. Nicole's three other friends did belong to the gang.

Jackson and Davis identified the shooter as Doheen "Tiny Killer D" Pratt, a member of the "Young Bastards Click" of the 190 East Coast Crips gang. No one at the scene could identify the other two passengers in the sedan, and neither the sedan or the gun were ever recovered. The gun used was either a .38-caliber or 357-revolver, or a nine- millimeter semi-automatic weapon. No casings were found at the scene.

In May 2005, Los Angeles Sheriff's Department Detectives Mitch Loman and Mitch Robison interviewed Jonte Chrishon, who was a member of the Bounty Hunter Watts gang, about the November 2003 shooting. Chrishon told them that the day after the shooting, Doheen Pratt, defendant, and Marcus Lloyd visited him and told him they

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[1] We rely on our prior opinion for the factual background and procedural history. (*People v. Johnson* (April 16, 2007, B195169) [nonpub. opn.].)

had stolen a car and "busted some Tennis Shoes" (Centerview gang members) in a drive-by shooting. Chrishon explained that defendant and Lloyd had given the gun to Pratt, who was on a "virgin mission" and that Pratt was the shooter. The three men told Chrishon they had a .380 Tech and a .38 caliber but only used one gun for the shooting.

Detective Loman interviewed Lloyd. Upon being told that Chrishon had implicated him in the shooting, Lloyd agreed to tape a conversation with defendant, who was in custody on an unrelated matter. Sheriff's detectives put Lloyd and defendant together in a wired jail van. Lloyd asked defendant whether he remembered when he "shot that bitch," and defendant responded "Yeah." Lloyd and Johnson recalled the shooting happened around Thanksgiving. A tape of their conversation was played for the jury.[2]

Expert gang testimony at trial established that defendant, Pratt and Lloyd were members of the Young Bastards Click of the 190 East Coast Crips gang; the primary activities of the gang were auto theft, assault, robbery, murder, narcotics sales, and vandalism; the gang claimed territory by the means of violence and intimidation; and a shooting would enhance a gang member's reputation.

Defendant contended the car belonged to another gang member, "Little Smurf," and another member of the gang, Marcus Shipp, had actually done the shooting. In rebuttal, the prosecution established that Shipp was in custody at the time of the shooting.

A jury convicted defendant of one count of first degree premeditated murder and one count of attempted murder (Pen. Code, §§ 187, subd. (a), 664),[3] with true findings that a principal used a firearm (§ 12022.53, subds. (b)–(e)(1)) and the offenses were

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[2] Defense counsel objected to admission of the evidence, arguing that because Lloyd was acting as a police agent, any statements he obtained would be subject to the same rules as statements obtained by police officers, and therefore *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*) would apply. The trial court overruled the objection, concluding that a suspect need not be given *Miranda* warnings before being questioned by persons who were not police officers because in that circumstance, there was no coercion.

[3] All further statutory references are to the Penal Code unless otherwise indicated.

committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)). Defendant was sentenced to a term of 90 years to life.

On appeal, we affirmed defendant's conviction, but modified his sentence to an aggregate term of 75 years to life. (*People v. Johnson* (April 16, 2007, B195169) [nonpub. opn.].) The California Supreme Court denied his petition for review on March 26, 2008, and the United States Supreme Court denied his petition for writ of certiorari on October 14, 2008. Petitioner's petition for writ of habeas corpus filed in Los Angeles County Superior Court was denied on June 24, 2009, and he filed this petition for habeas corpus on July 24, 2009.

DISCUSSION

Defendant contends that (1) assignment of his petition for writ habeas corpus in the trial court to the same judge who presided over his trial denied him due process and equal protection (see *Fuller v. Superior Court* (2004) 125 Cal.App.4th 623, 626); (2) admission of the taped conversation with Lloyd violated his Sixth Amendment right to counsel (*Massiah*, *supra*, 377 U.S. 201); (3) trial counsel's failure to object to the taped conversation constituted ineffective assistance of counsel; (4) trial counsel's failure to object to the "false friend" evidence constituted ineffective assistance of counsel; and (5) appellate counsel's failure to raise on appeal grounds two through four of this habeas petition constituted ineffective assistance of counsel. (*Spano v. New York* (1959) 360 U.S. 315, 323 [79 S.Ct. 1202, 3 L.Ed.2d 1265].)

We deny the petition on the grounds defendant had not been charged with an offense at the time of the taped conversation, and thus his Sixth Amendment right to counsel had not attached. We further reject his other arguments that testimony obtained with an undercover informant should only be permitted where the defendant has previously been given *Miranda* warnings by the police, that the use of a false friend was unfair and violated the Sixth Amendment, and that section 859c did not bar the judge who presided over his trial from hearing his habeas petition.

I.

In *Massiah*, the Supreme Court held that once a judicial proceeding against a defendant has commenced and the Sixth Amendment right to counsel has attached, the government may not deliberately elicit statements from the accused in the absence of counsel. (*Massiah, supra*, 377 U.S. at pp. 205–207.)

The *Massiah* right is offense specific, however, and applies only to offenses to which adversary judicial criminal proceedings have commenced, including formal charges, preliminary hearing, indictment, information, or arrangement. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 175 [111 S.Ct. 2204, 115 L.Ed.2d 158] (*McNeil*).) The Sixth Amendment right to counsel does not extend to uncharged offenses even where such offenses are inextricably intertwined factually with the charged offenses. (*Texas v. Cobb* (2001) 532 U.S. 162, 164, 167 [121 S.Ct. 1335, 149 L.Ed.2d 321].) "[E]ven after an accused has counsel with regard to a particular charged offense, he or she may be questioned by police following *Miranda* advisements with respect to any uncharged offense. [Citation.] Incriminating statements pertaining to those uncharged offenses, as to which the Sixth Amendment right has not yet attached, are inadmissible at a subsequent trial of those offenses." (*People v. Slayton* (2001) 26 Cal.4th 1076, 1079, fn. omitted.)

Where the defendant has been charged with a crime and the government elicits information through the use of an undercover informant, the defendant must demonstrate that both the government and the informant took some action, beyond merely listening, that was designed to elicit incriminating statements. (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459 [106 S.Ct. 2616, 91 L.Ed.2d 364]; *In re Neely* (1993) 6 Cal.4th 901, 915.) The defendant must show the informant was acting on behalf of the police in accordance with a preexisting agreement and with the expectation of receiving a benefit, and that the informant deliberately elicited the statements. (*In re Neely*, *supra*, at p. 915.)

While the *Massiah* right is based on the Sixth Amendment, a different right derives from the Fifth Amendment: a criminal suspect has a right to remain silent and to have counsel present during a custodial interrogation. (*Miranda*, *supra*, 384 U.S. at

p. 444.) A custodial interrogation is questioning initiated by police officers after a person has been taken into custody; warnings are required because a police-dominated atmosphere generates "inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." (*Id.* at pp. 445, 467.)

In *McNeil*, *supra*, 501 U.S. 171, the Supreme Court considered the intersection of *Miranda* and *Massiah.* There, the defendant was arrested in connection with an armed robbery, given his *Miranda* warnings, questioned, but did not request an attorney. However, appointed counsel represented him at the preliminary examination. (*Id.* at p. 173.) Later, detectives questioned defendant in connection with different offenses, gave him *Miranda* warnings, and defendant admitted his involvement and implicated two other persons. (*Id.* at p. 174.) Defendant appealed his conviction on the second set of offenses, arguing that his appearance with counsel at the preliminary hearing for the first offense constituted an invocation of his Fifth Amendment right to counsel that precluded police interrogation on unrelated, uncharged offenses. (*Id.* at p. 175.)

McNeil rejected defendant's attempt to turn his invocation of his offense-specific Sixth Amendment right to counsel for the offense into a simultaneous invocation of the non-offense specific *Miranda* right to counsel. The court found the purpose of the Sixth Amendment guarantee of counsel was to protect the unaided layman from critical confrontations with the government after the adverse positions of the government and defendant have solidified for the charged offense. On the other hand, the *Miranda* right protected a suspect's need to deal with the police through counsel—a narrower right in one sense because it only applied in custodial interrogations, but broader in another sense because it was not offense specific. "To invoke the Sixth Amendment interest is, as a matter of *fact, not* to invoke the *Miranda-Edwards* interest." (*McNeil*, *supra*, 501 U.S. at p. 178.)

Finally, the court rejected as a matter of policy that the assertion of the Sixth Amendment right to counsel would imply an assertion of the *Miranda* Fifth Amendment right. Adoption of such a rule would result in "most persons in pretrial custody for

serious offenses [being] *unapproachable* by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned.* Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser." (*McNeil*, *supra*, 501 U.S. at p. 180–181.)

In *Texas v. Cobb*, *supra*, 532 U.S. 162, the court similarly considered the scope of *Miranda* and *Massiah.* In that case, defendant was indicted for a burglary and counsel was appointed. Detectives received permission from counsel to question defendant about the disappearance of two of the burglary victims, but was released after denying any involvement. (*Id.* at p. 165.) After defendant confessed to his father that he had killed the two missing victims, police took him into custody and gave him *Miranda* warnings. Defendant again confessed to murdering the burglary victims. (*Id.* at pp. 165–166.) The court of appeals held that once the Sixth Amendment right to counsel attached to a charged offense, it extended to other offenses that were closely related factually to the charged offense. (*Id.* at p. 167.)

The Supreme Court reversed, finding that the Sixth Amendment was offense specific, and no policy reason existed for deviating from this rule because the suspect must still be apprised of their *Miranda* rights, and the constitution did not negate society's interest in the ability of police to interrogate witnesses and suspects who have been charged with other offenses. (*Texas v. Cobb*, *supra*, 532 U.S. at pp. 168, 171–172.) Further, the court held that an "offense" for purposes of the Sixth Amendment could be defined by the *Blockburger* test,[4] which posits that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or only one is whether each statute requires proof of a fact that the other does not. (*Id.* at p. 173.)

In *Illinois v. Perkins* (1990) 496 U.S. 292 [110 S.Ct. 2394, 110 L.Ed.2d 243], the defendant was in prison when he told a fellow inmate about a murder he had committed.

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[4] *Blockburger v. United States* (1932) 284 U.S. 299 [52 S.Ct. 180, 76 L.Ed. 306].

The inmate reported defendant's confession to authorities, but by that time defendant had been released from prison and was in custody on an unrelated charge. (*Id.* at p. 294.) Police decided to interrogate him on the murder charge by placing an undercover agent in the cellblock with defendant, and to use the inmate informant to elicit conversation with defendant. (*Id.* at pp. 294–295.) The Supreme Court held conversations between suspects and undercover agents did not implicate *Miranda.* "The essential ingredients of a 'police dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate. . . . [¶] It is the premise of Miranda that the danger of coercion results from the interaction of custody and official interrogation." (*Id.* at pp. 296–297.) On the other hand, *Massiah* did not preclude the use of an informant because no charges had been filed against defendant. (*Id.* at p. 299.)

Here, defendant had not been charged with the current offense when Lloyd elicited his incriminating statements. The tape-recorded van conversation took place June 1, 2005; defendant was not arrested for the current offense until July 13, 2005. Thus, there were no pending proceedings to bring him within the ambit of the Sixth Amendment right to counsel. (*People v. Webb* (1993) 6 Cal.4th 494, 527.) Further, for that reason it is immaterial whether Lloyd was acting at the behest of authorities. (*People v. Thornton* (2007) 41 Cal.4th 391, 434).

Nonetheless, defendant argues that because the suspects in *McNeil* and *Cobb* were given their *Miranda* warnings before they revealed incriminating information to undercover informants, we should apply a "restrictive rule" that the right only attaches where prosecution has begun and where law enforcement officers themselves have elicited the statements from a defendant and given *Miranda* warnings. He contends this rule was applied in *People v. Slayton*, *supra*, 26 Cal.4th 1076 because there, a detective questioned the suspect on a separate offense after obtaining a *Miranda* waiver. (*Id.* at pp. 1079–1081.)

We reject this argument because, as the above authorities demonstrate, the Supreme Court has made a careful distinction between the interests protected by *Miranda*

and *Massiah,* and they do not overlap in the manner defendant argues. *Massiah* protects the charged defendant's interest in having counsel present when questioning occurs. *Miranda* protects a criminal suspect against the coercive environment of a police interrogation. Further, contrary to defendant's argument, in *Cobb* and *McNeil,* the presence or absence of *Miranda* warnings did not impact the court's *Massiah* analysis in any fashion; rather, *Miranda* simply does not apply to conversations between a suspect and an undercover agent. (*People v. Williams* (1988) 44 Cal.3d 1127, 1141–1142 ["*Miranda* does not apply to noncustodial police interrogation or to nonpolice custodial interrogation"].)[5]

II.

Defendant contends the taped conversation should have been excluded because it was obtained with the use of a "false friend" in an attempt to knowingly circumvent his Sixth Amendment rights. (See *Spano v. New York*, *supra*, 360 U.S. at p. 323; *People v. Martin* (2002) 98 Cal.App.4th 408, 419.) He also requests that we find a due process violation because the sheriff's conduct in using his friend Lloyd as an informant did not constitute fair play. (See, e.g., *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790 [93 S.Ct. 1756, 36 L.Ed.2d 656].)

Defendant's "false friend" argument has roots in *On Lee v. United States* (1952) 343 U.S. 747 [72 S.Ct. 967, 96 L.Ed. 1270], where the Supreme Court found "[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility." (*Id.* at p. 757.) *Spano v. New York, supra,* 360 U.S. 315 involved a Fourteenth Amendment challenge to a coerced confession that had been obtained with the use of oppressive questioning, harsh

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[5] For this reason, defendant's reliance on *People v. Slayton*, *supra*, 26 Cal.4th 1076, is misplaced, because *Slayton* did not involve an undercover agent, but a custodial interrogation on an uncharged offense where other factually related charges were pending. (*Id.* at pp. 1080–1081.) The defendant there argued that the *Massiah* rule should apply to offenses that are ultimately charged together. *Slayton* rejected the argument as contrary to *Cobb's* holding that the Sixth Amendment right did not apply to factually related crimes. (*Id.* at pp. 1084–1085.)

conditions, and the use of a "false friend." (*Id.* at pp. 315–320.) The court found under the totality of the circumstances that the confession was involuntary and could not stand. (*Id.* at p. 321.)

However, the false friend inquiry remains a Sixth Amendment analysis and requires a determination of whether the informant was acting as an agent for the police. (*People v. Martin, supra*, 98 Cal.App.4th at p. 418.) Furthermore, the analysis requires a determination of whether charges are pending, and a Sixth Amendment argument fails even where the police knowingly attempt to use an informant to obtain statements outside the presence of counsel. (*Id.* at pp. 423–424.) Thus, defendant cannot rely on the fact that Lloyd was acting as "false friend" when he elicited incriminating statements from defendant because no charges were then pending against defendant.

Finally, the substantive aspect of the federal due process clause protects individuals from being deprived of fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to a compelling state interest. (*Reno v. Flores* (1993) 507 U.S. 292, 301–302 [113 S.Ct. 1439, 123 L.Ed.2d 1].) Defendant can show no unfairness because it is constitutionally permissible under the Sixth Amendment to elicit incriminating remarks where no charges have been filed; therefore, the sheriff's use of the wired van was not "unfair" and does not rise to the level of a due process violation.

III.

For the reason that defendant's taped statement was properly admitted, we reject his ineffective assistance of counsel claims.

The right to effective assistance of counsel derives from the Sixth Amendment right to assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686–694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; see also Cal. Const., art. I, § 15.) To demonstrate ineffective assistance, defendant must show (1) counsel's conduct was deficient when measured against the standards of a reasonably competent attorney, and (2) prejudice resulting from counsel's performance "'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'"

(*People v. Mayfield* (1997) 14 Cal.4th 668, 784.) Prejudice is shown where there is a reasonable probability, but for counsel's errors, that the result of the proceeding would have been different. (*In re Harris* (1993) 5 Cal.4th 813, 832–833.)

Our review of counsel's performance is deferential, and strategic choices made after a thorough investigation of the law and facts are "virtually unchallengeable." (*In re Cudjo* (1999) 20 Cal.4th 673, 692.) Here, because Sixth Amendment jurisprudence is unequivocal that for a defendant to raise a *Massiah* issue there must be pending charges, any objection to the taped interview by trial counsel would have been meritless, and raising the argument on appeal would have been similarly fruitless. Counsel's performance is not deficient when it is based upon a sound evaluation of the law.

IV.

Lastly, we reach defendant's contention based upon section 859c that we must reverse because the same judge who presided over his trial heard his habeas corpus petition filed in superior court.

In *People v. Fuller*, *supra*, 125 Cal.App.4th 623, the court held that under section 859c,[6] a defendant's petition for writ of habeas corpus was wrongfully heard by the same judge who denied her motion to dismiss a misdemeanor. (*Id.* at p. 627–628.) However, section 859c, which applies to pretrial proceedings, has no application to defendant's instant posttrial habeas petition.

[6] Section 859c provides, "Procedures under this code that provide for superior court review of a challenged ruling or order made by a superior court judge or a magistrate shall be performed by a superior court judge other than the judge or magistrate who originally made the ruling or order, unless agreed to by the parties."

DISPOSITION

The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.